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No. 79-509

In the Supreme Court of the United States

OCTOBER TERM, 1979

EXXON CORPORATION,

Appellant,

vs.

WISCONSIN DEPARTMENT OF REVENUE,

Appellee.

On Appeal From the Supreme Court of Wisconsin

OBJECTION TO MOTION OF FRANK M. KEESLING FOR LEAVE TO FILE BRIEF AMICUS CURIAE

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Pursuant to Rule 42(3) of the Rules of the Supreme Court of the United States, Appellant files this objection to the motion of Frank M. Keesling for leave to file brief amicus curiae. This objection is based upon the following reasons:

1. No Consent Requested.

Movant neither requested nor received the consent of counsel for Appellant to submit a brief amicus curiae. Rule 42(3) makes a request for consent of the parties a condition precedent to the filing of such a motion.

> "When consent to the filing of a brief of an amicus curiae is refused by a party to the case, a motion for leave to file may timely be presented to the court. . . ."

Since no consent was requested of Appellant, as acknowledged in paragraph 1 of his motion (Movant's brief, p. 1), Movant has not satisfied this condition precedent.

2. Movant is Professionally Disqualified to Act in Any Capacity as a Lawyer in This Case Because He Appeared as a Witness for the Appellee.

As acknowledged in Movant's motion (brief, par. 2(c), p. 4) and his statement of interest (brief, p. 7), Mr. Keesling appeared as a witness for the Appellee, the Wisconsin Department of Revenue, in the trial of this case before the Wisconsin Tax Appeals Commission. Now, attempting to wear an additional hat as lawyer—amicus curiae, Movant seeks to augment and support his own testimony. See, *e.g.*, brief, pp. 7; 21, fn. 3; 24. And he cites his own testimony (brief, p. 7) and law review articles (brief, pp. 12, fn. 1; 14, fn. 2; 19; 23-24, fn. 4) as authority. Such a patently obvious bootstrap approach is not permissible, nor is it helped by Appellee's consent to the effort. See Exhibit A to Movant's brief.

It is so well recognized as to be axiomatic that a lawyer may not serve as both advocate and witness in the same cause, and this is expressly recognized in the American Bar Association's Code of Professional Responsibility, which has also been adopted by the Wisconsin Supreme Court.

See Canon 5, Disciplinary Rule 5-102, and Ethical Consideration 5-9. EC 5-9, printed in Martindale Hubbell Law Directory Vol. VII (1980), A.B.A. section p. 25M, states in part:

> "The roles of an advocate and of a witness are inconsistent; the function of an advocate is to advance or argue the cause of another, while that of a witness is to state facts objectively."

The fact that Movant appeared as a purported expert witness in no way changes the situation. Indeed, the situation is aggravated because Movant opines on various topics in his brief on which he was not questioned by Appellee's counsel nor cross-examined by counsel for Appellant.

3. Movant Does Not Have a Sufficient Interest in the Case.

This Court's rules do not set forth the requisite qualification a party must have in order to file an amicus curiae brief. Although Rule 42(3) does provide that in a motion for leave to file such a brief, the applicant must state the nature of his interest. Consent to the filing of an amicus curiae brief should only be given when the applicant has a concrete and substantial interest in the decision of the case. Mr. Keesling has shown no such interest and he even concedes, at page 7 of his motion and brief, that he "is not representing anyone in this matter." The only interest he has is that of supporting his own theses and concepts as a practicing lawyer, author and witness in the field of state taxation.

Mr. Keesling without a client has no real interest in the decision of this case, and he must be disqualified as an amicus curiae.

4. Movant's Qualifications to Voice Opinions in This Case Have Already Been Impeached.

While appearing as a witness in this case, Mr. Keesling, over objection based upon lack of proper factual foundation and lack of qualification to give expert testimony as an economist (A. 579, 591, 594), testified that the marketing operation of Humble (Appellant's predecessor) in Wisconsin was an integral part of a unitary business (A. 594-95). On cross examination he acknowledged having *no* credentials as an economist and he admitted having *no* specific contact with the operations of Humble Oil & Refining Company and its operations in Wisconsin (A. 596-97). He also admitted that he did not *even* know the brand name under which Humble marketed gasoline in Wisconsin during the years in issue (A. 597). Thus, his opinions were conclusively impeached as having no expert economist or factual foundation.

Despite this, Movant now is asking the Court to consider his views, both as witness and as advocate.

CONCLUSION

Based upon the foregoing reasons, Appellant submits that Movant cannot be viewed as a proper advocate in this matter, and respectfully requests that his motion for leave to file a brief amicus curiae be denied.

Respectfully submitted,

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